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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LAUREL COUNTY AND LAUREL COUNTY
FISCAL COURT
Cross-Petitioners

vs.

UNITED STATES
Cross-Respondent

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether the United States should have been dismissed as a party to an action by a surety against construction project owners which honored an IRS tax levy against property of the contractor where the owners interpled the United States for indemnity.

LIST OF PARTIES

The parties to the proceeding in the Court of Appeals were the Commonwealth of Kentucky for the benefit of United Pacific Insurance Company and United Pacific Insurance Company, Plantiffs-Appellees; Laurel County and Laurel County Fiscal Court; Defendants and Third-Party Plaintiffs-Appellants; Laurel County Board of Education, Defendant-Appellant; and the United States of America, Third-Party Defendant-Appellee.

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APPENDIX

United States Code, Title 26

S6532. Procedure and Administration

(c) Suites by persons other than taxpayers.--

(1) General Rule.--Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) Period when claim is filed.--If a request is made for the return of property described in section 6343 (b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary or his delegate to the person making such request of a notice of disallowance of the part of the request to which the action related, whichever is shorter.

United States Code, Title 26

S7426. Civil actions by persons other than taxpayers

(A) Actions permitted.--

(1) Wrongful levy.--If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that

such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

United States Code, Title 28

§1335. Interpleader

(a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue or any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the amount due under such obligation into the registry of the court, there to abide the judgement of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or

architect certified on April 17, 1970 that $116,666.59 was due and payable to the contractor for work currently performed on the contract. The architect's certificate was sent to the Board of Educators requesting the issuance of a check in payment of the monthly draw.

On May 18, 1970, the IRS revenue officer visited the County Treasurer and served him with a tax levy referencing the tax liens and requesting all property or rights to property held by the project owners in favor of Y & S Construction Company, Inc. The visit on May 18 was the second time the IRS officer had served the Treasurer with a levy. Between the visits, the Treasurer had consulted both the County Attorney and private counsel with respect to his and the County's responsibilities for honoring such levy. At the time of the second visit on May 18, the Treasurer, advised of the substantial risk of liability for refusal to honor the levy, issued a check payable to the IRS for $100,833.91, drawn against the Y & S Construction Company Project account, and in direct response to the service of the levy. The same day, May 18, the Treasurer sent notice to the surety of the amount paid to the IRS on the levy.

B. PLEADING HISTORY

The surety, United Pacific, filed an action based on diversity of citizenship in August, 1974 in the U.S. District Court for the Eastern District of Kentucky. The suit was against Laurel County, its Fiscal Court, the individual members, the Laurel County Board of Education, its members, and Maryland Casualty Company. The Board of Education, Laurel County and the Fiscal Court moved to dismiss the Complaint for the Plaintiff's failure to join the Internal Revenue Service as an indispensable party to the action. When the motions were overruled, Defendants

answered Plaintiff's Complaint, and thereafter joined the United States as a Third-Party Defendant because of the sum seized pursuant to the IRS levy. The United States was dismissed by the Court's Order of March 19, 1976, based upon the language contained in 26 U.S.C. §7426 (a), providing for actions involving alleged wrongful tax levies. The Court found the Statute of Limitations in 26 U.S.C. §6532 (c), prevented such action against the United States.

The dismissal of the United States was interlocutory, but was made final by reason of the Court's entry of Summary Judgement on January 16, 1985. Defendants' Motion to Alter or Amend the Judgement was partially granted by the Court and an Amended Judgement was entered May 1, 1985.

An appeal was taken to the Sixth Circuit Court of Appeals whereupon the District Court's Judgement was affirmed in part, reversed in part and remanded for further proceedings concerning the existence of the IRS levy. The Judgement of the Court of Appeals, entered November 14, 1986, was amended by Order entered February 4, 1987.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEAL AS TO THE JOINDER OF THE UNITED STATES AS A PARTY FOR INTERPLEADER.

The District Court dismissed the County agencies' Third-Party Complaint against the U.S. on March 19, 1976 as being untimely. The Court held that the only statutory provision which could be applicable was 26 U.S.C. §7426, an action for wrongful levy. The Court further held that the nine month Statue of Limitations provided for bringing such wrongful levy actions could only be extended to twelve months under 26 U.S.C. §6532 (c). These Cross-Petitioners argued that their Third-Party Complaint should have been treated as one for interpleader under 28 U.S.C. §2410 (a) (5), for which the Statute of Limitation is six years under 28 U.S.C. §2401. The Sixth Circuit determined that since the agencies honored the levy, they could not maintain an interpleader action under Section 2410 (a) (5), since they were not stakeholders in possession of property subject to conflicting claims.

However, the United States should have been precluded from arguing that Section 2410 did not apply, since it was the Internal Revenue Service's administrative tax levy which caused the Cross-Petitioners to become dispossessed of the funds. As stated in 45 Am Jur 2d, INTERPLEADER, §3, P 435,

> In as much as interpleader is a remedy for the benefit of a holder of a contested stake, it is not, ordinarily, available to a party not in possession of anything that may cause him to be in jeopardy from conflicting claims; as a rule, only a stake-

> holder may maintain a bill of interpleader. But when a claimant has seized the fund or thing by a force that the stakeholder was unable to resist, the latter should be excused from bringing or offering to bring the subject matter into court.

See also, *C.F. Duke Storage Warehouse, Inc. v. Keller, et. al.*, 55 A.2d 901 (N.J., 1947).

In addition, several Circuit Courts of Appeal which have considered the issue, have determined that interpleader, as provided by federal rule (FRCP 22), does not require the depositing of the contested funds with the Court as a necessary element for maintaining such an action. See *Gelfgren v. Republic National Life Insurance Company,* 680 F2d 79 (9th Cir., 1982), *Percival Construction Company v. Miller & Miller Auctioneers, Inc.,* 532 F2d 166 (10th Cir., 1976), and *Murphy v. Travelers Insurance Company,* 534 F2d 1155 (5th Cir., 1976). The actions for interpleader and in the nature of interpleader referred to in §2410 (a) (5) are not restricted to statutory interpleader as contained in 28 U.S.C. §1335, but include rule interpleader in FRCP 22. Therefore, the waiver of sovereign immunity in §2410 should have allowed these Cross-Petitioners to maintain their third-party action against the United States in the case below.

The provisions of 26 U.S.C. §7426 do not apply to these Cross-Petitioners. Laurel County and its Fiscal Court do not qualify as, "persons other than taxpayers" who are permitted to bring an action under that section. That section of the tax code allows, "any person who claims an interest in or a lien on such property and that such property was wrongfully levied upon," to bring an action for wrongful levy. The county agencies do not qualify, since they were mere stakeholders of the property, and claimed no interest in the property. Only the surety, United

Pacific, was a person who claimed an interest in or a lien upon such property levied upon by the IRS. Therefore, the Statute of Limitations provided in 26 U.S.C. §6532 (c), did not apply to bar the county agencies' Third-Party Complaint against the United States.

28 U.S.C. §2410 (a) (5), is a waiver of sovereign immunity for actions against the United States for interpleader or in the nature of interpleader with respect to property on which the United States claims a lien. Since the tax levy does not decide questions of ownership, but merely transfers possession of property, the lien of the United States against the property levied upon remains the basis of the IRS' claim to the funds. In *United States v. National Bank of Commerce,* 472 U.S. _____, 86 L.Ed. 2d 565, 105 S. Ct. _____, (1985), this Court held,

> In contrast to the lien foreclosure suit, the levy does not determine whether the government's rights to the seized property are superior to those of other claimants. p. 574.

Further, this Court called such a levy a mere provisional remedy, "leaving ownership desputes to be resolved in a post-siezure administrative or judicial proceeding." p. 579. On page 581 the Court called the levy provisions of the tax code, "a provisional remedy, which does not determine the rights of third parties until after the levy is made, in post-seizure administrative or judicial hearings."

The Sixth Circuit draws a distinction based upon the fact that the funds had already been transferred to the IRS upon the levy. But since the basis of the United States' claim to the funds remains its lien, and not its administrative levy, §2410 (a) (5) continued to be a wavier of sovereign immunity specifically for the thrid-party action against it by the county agencies for interpleader.

Federal Rules of Civil Procedure 22, the interpleader rule, does not require the payment of the contested funds into court in order for the interpleader action to be proper. The procedures in the federal rule are encompassed in the language contained in §2410 (a) (5). Therefore, the county agencies, having honored the IRS levy, should be permitted to bring an action for interpleader or in the nature of interpleader as was attempted in the Third-Party Complaint against the United States in the action below. As a matter of policy, the Opinion of the Sixth Circuit holding the Third-Party Complaint improper, and dismissing the United States as a party, conflicts with the decision of this Court in *United States v. National Bank of Commerce,* Supra.

CONCLUSION

Because of the nature of the action in its present procedural form, this Cross Petition is contingent upon the Court's granting the Petition of United Pacific Insurance Company for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in no. 86-1772. Should this Court grant the Petition, the Cross Petition should also be granted, to consider the effect of applicable federal law and to review the Judgement and Opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this Cross Petition for Writ of Certiorari were served by mail to Hon. Bernard L. Balkin and Hon. Keith Witten, Sandler, Balkin, Hellman & Weinstein, P.C., 3130 Broadway, Third Floor, Kansas City, Missouri 64111; Hon. William Gary Crabtree, 120 E. Fourth Street, P.O. Box 428, London, Kentucky 40741; Hon. Roger M. Olson, Assistant Attorney General, Department of Justice, Washington, D.C. 20530; Hon. Louis De Falaise, United States Attorney, Eastern District of Kentucky, Federal Building, Lexington, Kentucky 40507 and the Solicitor General, Department of Justice, Washington, D.C. 20530, on this 2nd day of June, 1987.

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Appendix

No.

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OCTOBER TERM, 1986

LAUREL COUNTY AND LAUREL COUNTY
FISCAL COURT
Cross-Petitioners

VS.

UNITED STATES
Cross-Respondent

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cross-Petitioners, Laurel County and Laurel County Fiscal Court respectfully pray that a Writ of Certiorari issue to review the Judgement and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 14, 1986, as amended on a Motion for Rehearing on February 4, 1987.

OPINIONS BELOW

The Opinions of the Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Kentucky appear in the Appendix of the Petition filed by United Pacific Insurance Company at Pages A-1--A-21 and A-22--A-30, respectively, in case no. 86-1772.

JURISDICTION

A Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit filed in this Court by United Pacific Insurance Company, was received by these Cross-Petitioners on May 3, 1987. This Cross-Petition for Certiorari was filed within thirty days of that date in reliance upon Rule 19.5. This Court has jurisdiction under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS

This case involves the construction and application of 26 U.S.C. §6532 (c) and §7426 (a), and 28 U.S.C. §1335, §2401 (a), and §2410 (a) (5).

STATEMENT OF THE CASE

A. FACTS

The Internal Revenue Service filed a Notice of Tax Lien against Y & S Construction Company, Inc., the general contractor for the Laurel County High School Building Project on February 4, 1970, and filed a second Notice on March 11, 1970. The tax liens were for withholding taxes for the thrid and fourth quarter of 1969 which the contractor had apparently failed to submit to the IRS.

Shortly after March 15, 1970, the project owners, Laurel County and the Laurel County Board of Education, received notice from the contractor that it was abandoning the project to its surety, United Pacific. It requested that all further funds for the project should thereafter be paid to its surety. On March 31, Y & S Construction Company submitted Application No. 13 requesting progress payment for construction work accomplished during the calendar month of March, 1970. The

judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgement of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another. June 25, 1948, C. 646, 62 Stat. 931.

United States Code, Title 28

§2401. Time for commencing actions against United States

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accures. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

United States Code, Title 28

§2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter--

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to,

real or personal property on which the United States has or claims a mortgage or other lien.